

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1976

No. 

76-1150

BALDWIN, et al., Appellants

v.

FISH AND GAME COMMISSION, et al., Appellees

MOTION TO AFFIRM
and
STATEMENT OPPOSING APPELLANTS' MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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November 10, 1976

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1976

No. 76-5528

BALDWIN, et al.,

Appellants,

v.

FISH AND GAME COMMISSION, et al.,

Appellees.

MOTION TO AFFIRM

Appellees, Fish and Game Commission of the State of Montana, et al., pursuant to Rule 16 of the Supreme Court of the United States, move to affirm the judgment entered August 12, 1976, by the U. S. District Court for the District of Montana sitting as a Three-Judge Court pursuant to 28 U.S.C. § 2281, on the ground that the question presented by this appeal is so unsubstantial as not to require further argument. Concurrently herewith by separate pleading, Appellees also state their opposition to Appellants' Motion For Leave To Proceed In Forma Pauperis.

In their Jurisdictional Statement dated October 8, 1976, Appellants raise two questions as presented in this appeal. The first of these inquires whether comity among the several states will be maintained as a result of the District Court's decision. The second questions whether a state may favor its residents in order to assure the political support of its citizens for state programs. By such indirection Appellants disguise the issue. There is no Constitutional infirmity in the

District Court's decision. The question answered in the affirmative by the District Court and now before this Court is whether differential treatment accorded non-residents by Montana in the challenged license scheme is a rational exercise of that State's broad trustee and police power to conserve, manage and protect its wildlife resource. ^{1/}

The license scheme set forth in the challenged Montana statutes acts as a control device to limit the degree of hunter access to the state's wildlife resource. This access is measured in hunter days, ^{2/} and the control mechanism employed is that of establishing fees for the subject hunting licenses. The essential impact of the combination license requirement for non-residents to hunt elk, and of the underlying discrimination against non-residents for other challenged hunting licenses, is the imposition upon non-residents of an additional economic cost, intended to hold down the number of non-residents who pursue recreational hunting opportunities in Montana.

That this discriminates against non-residents is but a corollary of the fact that any regulatory system which imposes a license fee in some sense discriminates against those who cannot afford to pay it. Opinion, p. 8. But for Montana to favor its residents in the protection and enjoyment of its wildlife resource cannot in itself be said to be

^{1/} The District Court recognized (Opinion, p. 6) that under either the "trust ownership" or "police power" theories, Montana has the power to manage and conserve its wildlife and to make laws in pursuance of that power. The court found it unnecessary to choose between these two theories, so that issue is not put before this Court on appeal. *Kleppe v. New Mexico*, ___ U.S. ___, 49 L. Ed. 2d 34 (1976), re-affirms both trusteeship and police power as sources of state authority, and holds only that a state's power to regulate the taking of wildlife on federal lands within its boundaries is subordinate to the power of the Federal Government under the Property Clause, and if federal sovereignty is threatened so as to occasion exercise of the Supremacy Clause, an inconsistent state law must yield. No issue of federal sovereignty is raised by this appeal.

^{2/} Each day that one hunter is in the field is a hunter day. See Opinion, p. 7.

irrational or to impose an undue discrimination against non-residents. Having actively fostered an environment hospitable to big game populations, a state may prefer its own people in utilizing the bounties of nature within her borders. See Hughes v. Alexandria Scrap Corp., ____ U.S. ____, 49 L. Ed. 2d 220, 231 (1976). Whether use of such a regulatory device constitutes permissible discrimination requires an examination of the right claimed, the state purpose involved, and the justification for the discrimination. Opinion, p. 6.

The purpose of Montana's challenged license scheme is to restrict the number of hunter days. Opinion, p. 8. The record clearly shows that the influx of non-resident hunters into Montana is one of several problems which, if unaddressed, would result in increased hunting pressure on the state's wildlife resource over that which is presently the case. Tr. 18-19, 237-238, 244-245. This results from several factors, one being that the elk, the object of the combination license, is much sought for its trophy value as well as its meat value. The District Court found that non-resident hunters as a group are more interested in the trophy than are resident hunters as a group. Opinion, p. 2. The District Court also found that in recent years there has been an increase in the number of hunters in Montana and a disproportionate five-fold increase in the number of non-resident hunters.^{3/} The District Court aptly noted that, as to elk, there are too many people and too few elk. A vital part of the management of the elk and other wildlife populations is control of the annual harvest. That limitation may be accomplished in many ways, all of which involve to some degree a limitation upon hunter days. Opinion, p. 7. Thus the record demonstrates that non-resident hunting pressure poses a potential threat to which the Montana

^{3/} In the years between 1960 and 1970, Montana experienced an increase of 536% in non-resident hunting as compared with an increase of 67% in resident hunting. See Tr. 191, 250, 284, 291, 306.

legislature was forced to respond, in conjunction with other complex problems of wildlife conservation faced by the state. See Tr. 13-14, 194, 243. The facts are thus not unlike those posed to this Court in State v. Kemp, 44 N.W. 2d 214 (S.D. 1950), dismissed for want of a substantial federal question, 340 U.S. 423 (1951). In that case the Supreme Court of the State of South Dakota held that non-residents posed a peculiar evil in respect to the state's management over hunting of migratory waterfowl and upheld a state statute which forbade non-residents from hunting migratory waterfowl in that state.

Also bearing on the reasonableness of residence as a permissible classification in this case is the District Court's recognition that residents of Montana have contributed to conservation programs which support wildlife populations and which form the basis for the recreational opportunity at issue and consequently the state may prefer its residents over those of other states. Opinion, p. 9. This is based on ample record evidence that residents, unlike non-residents, contribute directly and indirectly on a continuing basis to underwrite the viability of Montana's wildlife resource. Tr. 191, 284-286. Indeed, they provide the sine qua non for continuation of effective conservation efforts in the state directed at the overall environmental condition necessary for the survival of wildlife.

That a standard of judicial scrutiny based on rational relationship was properly applied by the District Court is so settled as to preclude further argument.^{4/} Whatever legal characterization be applied to sport hunting,^{5/} it is recreational in character and expensive recreation at that.

^{4/} San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); see Cox, Developments in the Law, Equal Protection, 82 Harv. L. Rev. 1065, 1082-1083 (1969).

^{5/} Whether the activity under scrutiny is styled a privilege or right is immaterial. In any event it is clear, notwithstanding the dissenting opinion of Judge Browning below, that such a distinction is neither relevant nor determinative in the District Court's per curiam opinion.

Opinion, p. 7. As such it does not qualify as an activity to be accorded special protection under the Privileges and Immunities Clause, Art. IV, Sec. 2 of the United States Constitution. Appellants assert no deprivation of a fundamental right, such as the right to travel. See Memorial Hospital v. Maricopa County, 415 U.S. 270 (1974); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970) (cited in Jurisdictional Statement, p. 6). As stated by the District Court, "[t]here is simply no nexus between the right to hunt for sport and the right to speak, the right to vote, the right to travel, the right to pursue a calling." Opinion, p. 8. All related cases cited by Appellants deal with a non-resident's right to partake of a sister state's natural resources where commercial rather than recreational interests were involved. See, e.g., Toomer v. Witsell, 334 U.S. 385 (1948); Takahashi v. Fish and Game Com'n, 334 U.S. 410 (1948); Mullaney v. Anderson, 342 U.S. 415 (1952). This Court's discussion in Austin v. New Hampshire, 420 U.S. 646 (1975) reaffirms the settled understanding that the Privileges and Immunities Clause is applicable only when there is at issue a citizen's right to pursue commercial or occupational activities across state lines, or to partake in activities essential to his livelihood without special burdens imposed solely by reason of non-residence. In a decision handed down one year after this Court's seminal decision on the Privileges and Immunities Clause in Blake v. McClung, 172 U.S. 240, 248-249 (1898), the Circuit Court of Illinois flatly ^{rejected} ~~reflected~~ the assertion that sport hunting was a privilege protected by Article IV, Section 2 of the U. S. Constitution. In re Eberle, 98 F. 295 (C. C. Ill. 1899). ^{6/}

^{6/} Because sport hunting is not a privilege protected by Article IV, Section 2, we find the present appeal unlike Commonwealth of Massachusetts v. Westcott, No. 75-1775, cert. granted October 4, 1976, 45 U.S.L.W. 3221, and Douglas v. Seacoast Products, Inc., No. 75-1255, probable jurisdiction noted April 26, 1976, 44 U.S.L.W. 3608. Those cases arise in the context of commercial fishing disputes and dealt with the interrelation between the Submerged Lands Act of 1953 and the Privileges and Immunities Clause, and the Equal Protection Clause, Amendment XIV of the U. S. Constitution, respectively, as interpreted in Toomer v. Witsell, *supra*.

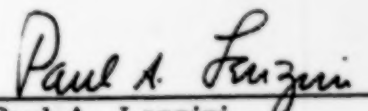
Where, as here, a rational relationship to a legitimate state interest is evident, and where the matter at issue is an economic exaction in furtherance of that legitimate interest, the Constitution does not require that the Montana statute be drawn to fit with precision the legitimate purposes animating the legislature. Hughes v. Alexandria Scrap Corp., *supra*, 49 L. Ed. 2d at 233; Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). That the statute might have been drawn more artfully or that Montana might have employed the mathematical exactitude inherent in the application of cost allocation principles is also irrelevant. See Opinion, pp. 8-9, see also Lindsley v. Natural Carbonic Gas, 220 U.S. 61 (1911). As a result, no substantial issues of equal protection are before this Court.

Despite this fact, Appellants argue that Montana's license scheme threatens comity between the states and forbodes retaliatory measures among them. That assertion will not create jurisdiction for this appeal where there is an absence of constitutional infirmity. In any event, there is no record evidence to support Appellants' speculations. Indeed, the International Association of Game, Fish and Conservation Commissioners, representing the fish and wildlife agencies of all fifty states, filed a brief amicus curiae with the District Court in support of Montana's authority to impose the subject license fee differential. Moreover, unlike the commuter income tax addressed in Austin v. New Hampshire, *supra*, the Montana fee structure adopts a long established nationwide practice in its essential effect, which is to limit by some measure a non-resident's access to a state's recreational resources by directing disparate economic measures against him. This occurs, moreover, in a context in which Montana continues to experience the greatest increase among the western states in numbers of non-resident hunters relative to numbers of resident hunters. Tr. 191, 250, 291, 306.

Finally, notwithstanding that a rational basis may exist to employ the Montana fee structure in order to support a resident political base necessary to underwrite the state's conservation programs, the stated independent ground to limit hunter days is sufficient to sustain the Montana statutes. See California Banker's Assn. v. Schultz, 416 U.S. 21, 71 (1974); Lindsley v. Natural Carbonic Gas, *supra*.

For these reasons, Appellees respectfully submit that no substantial federal question is raised by this appeal and that the judgment of the United States District Court for the District of Montana should be affirmed by the Supreme Court of the United States.

Respectfully submitted,


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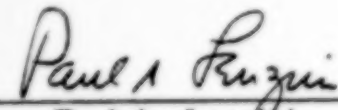
Of Counsel:

Clayton R. Herron, Esquire
Special Assistant Attorney General
State of Montana
P. O. Box 783
Helena, Montana 59601

Dated: November 10, 1976

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 1976, one copy of this Motion to Affirm was mailed by airmail, postage prepaid, to James H. Goetz, Esq., 522 West Main Street, P. O. Box 1322, Bozeman, Montana 59715, Counsel for Appellants. I further certify that all parties required to be served have been served.


Paul A. Lenzini

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1976

No. 76-5528

BALDWIN, et al.,

Appellants,

v.

FISH AND GAME COMMISSION, et al.,

Appellees.

STATEMENT OPPOSING APPELLANTS' MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Appellees, Fish and Game Commission of the State of Montana, et al., pursuant to Rules 35 and 53 of the Supreme Court of the United States, respectfully urge this Court to deny Appellants' Motion for Leave to Proceed in Forma Pauperis dated October 8, 1976. In support whereof Appellees show as follows:

I.

On October 8, 1976, Appellants Lester Baldwin, et al. moved this Court for permission to proceed in forma pauperis with respect to their appeal from a judgment entered on August 12, 1976^{1/} by a Three-Judge District Court convened in the U. S. District Court for the District

^{1/} A verification of the record below indicates that the judgment was in fact entered on August 12, 1976 although Appellants' Motion recites a date of August 11, 1976.

of Montana. In support of their motion, Appellants submitted the affidavits of Lester Baldwin, Donald J. Moris and David R. Lee, individually named Appellants herein. These affidavits state, inter alia, that each affiant desires to prosecute this appeal, but because of his poverty, is unable to pay necessary costs or give security therefor and still be able to provide the necessities of life for himself and family. Each affidavit further states that all Appellants are substantially in arrears for payment of legal fees and costs incurred in the District Court action. Appellants further state that their attorney has consented to represent them before this Court on a gratis basis.

II.

Appellees have re-examined sworn statements by Appellants Donald J. Moris and David R. Lee made in depositions taken in Helena, Montana, on January 16, 1976 in the District Court proceeding.^{2/} Such statements, while not explicitly contradicting the affidavits of each later filed with this Court, indicate a need for further scrutiny by this Court as to the sufficiency with which each meets the substantive statutory requirements of 28 U.S.C. § 1915, as adopted by Rule 53.1 of this Court.

They indicate, for example, that Mr. Moris, who is employed as an accountant in Lake Elmo, Minnesota, has hunted for sport on trips to Montana in 1969, 1970, 1974 and 1975. Moris Deposition, p. 4. He did not hunt in 1971, 1972 and 1973 because he took family vacations in those years. Id. at 9. Mr. Moris purchased a

^{2/} These depositions were admitted into evidence by the District Court (Tr. 452) and are attached hereto.

540-acre ranch west of Melrose, in Beavertail County, Montana, for \$96,000 in 1972, which he now leases to Mr. Baldwin. Id. at 11-12. However, Mr. Moris and his family have never resided on this property. Id. at 12. He has paid Mr. Baldwin for his outfitter services a fee of from \$225 to \$300 in each year he has hunted in Montana. Id. at 10. Mr. Moris did state, however, that a \$74 difference in hunting license fee would preclude his coming to hunt in Montana in 1976. Id. at 13. Mr. Moris states that his adjusted gross income in 1974 was approximately \$14,000 and that his taxable income was approximately \$4,700. He is married and has four children. Id. at 9.

The deposition of Mr. Lee states that he resides in Maplewood, Minnesota, and is employed as an electrician. He has sport hunted in Montana in 1969, 1970, 1973, 1974 and 1975. Lee Deposition, p. 2. He usually spends seven days in Montana during a hunting expedition as well as the day preceding the hunt. Id. at 5. His gross income was \$14,500 in 1975. Id. at 4. He has a wife and four children and has vacationed twice with his family in Montana. Id. at 10.

Neither Mr. Moris, Mr. Lee, nor any plaintiff below moved for permission to proceed in forma pauperis in the District Court.

Both Mr. Moris and Mr. Lee stated at the time of their depositions that each was sharing costs of this litigation with the other plaintiffs. Moris Deposition, p. 20; Lee Deposition, p. 10.

III.

Appellees are mindful of the previous pronouncements by this Court which state that a movant to proceed in forma pauperis on appeal

need not show complete destitution in order to support his motion. See Adkins v. E. I. DuPont de Nemours & Co., 335 U.S. 331, 339-340 (1948). Appellees are also aware of the public benefit which derives from the ability of poverty stricken litigants to prosecute their claims by virtue of the statutory provision now sought to be invoked. Appellees, however, suggest that the sworn depositions cited above and attached hereto cast doubt on the sufficiency of Appellants' allegations of poverty contained in their filed affidavits. Unless Appellants come forward with a more specific demonstration of need, Appellees respectfully submit that their motion should be denied by this Court.

Respectfully submitted,

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Dated: November 10, 1976

CERTIFICATE OF SERVICE

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Paul A. Lenzini
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

MONTANA OUTFITTERS ACTION GROUP,)
LESTER BALDWIN, RICHARD CARLSON,)
JEROME J. HUSEBY, DAVID R. LEE,)
and DONALD J. MORIS,)

Plaintiffs,)

-vs-)

FISH AND GAME COMMISSION OF THE)
STATE OF MONTANA; WESLEY WOODGERD,)
Director of the Department of Fish)
and Game of the State of Montana;)
ARTHUR HAGENSTON; WILLIS B. JONES;)
JOSEPH J. KLABUNDE; W. LESLIE)
PENGELLY; and ARNOLD RIEDER,)
Commissioners of the Fish and Game)
Commission of the State of)
Montana,)

Defendants.)

CV 75-80-BU

DEPOSITION

OF

DONALD J. MORIS

BE IT REMEMBERED: That the deposition of DONALD J. MORIS
was taken in shorthand and was also recorded on a tape recorder
by Mrs. S. Lynn Hiatt, a Notary Public for the State of Montana,
beginning at 1:30 P.M. on the 16th day of January, 1976, at
the office of Clayton R. Herron, Attorney at Law, Horsky Block
Building, Helena, Montana.

Present were JAMES H. GOETZ, Attorney at Law, 522 West
Main, Bozeman, Montana, representing the Plaintiffs; CLAYTON R.
HERRON, Attorney at Law, Horsky Block Building, Helena, Montana,
representing the Defendants; Lester Baldwin, P. O. Box 118,
Melrose, Montana; David R. Lee, 1721 Rosewood Ave., Maplewood, Minn.

It was stipulated and agreed by and between the parties
hereto, acting through their respective counsel, that the
deposition of DONALD J. MORIS may be taken at this time and

place, pursuant to agreement of counsel, by the Plaintiffs;
and that the deposition may be taken before S. Lynn Hiatt, a
Notary Public for the State of Montana, stenographically and
by use of a tape recorder and the deposition shall be taken in
accordance with the Federal Rules of Civil Procedure for uses
therein provided and in accordance therewith; and that all
objections, except as to the form of the question, are re-
served; and that it is taken pursuant to the Order of the Court
dated December 31, 1975.

The following proceedings were had:

DONALD J. MORIS, called as a witness by the Plaintiffs, having
been first duly sworn upon his oath, testified as follows:

DIRECT EXAMINATION BY MR. GOETZ

Q Would you state your name for the record?

A Donald J. Moris.

Q What is your occupation?

A Accountant.

Q Where do you live?

A Lake Elmo, Minnesota.

Q Are you generally familiar with this action brought by
the Montana Outfitters Action Group and others against
the Fish and Game Department of Montana?

A Yes, I am.

Q Are you a Plaintiff individually named in that action?

A Yes, I am.

Q Now, I assume that you have hunted in the State of Montana
in the past?

A Yes, I have.

Q What have you hunted for?

1 A I have hunted for elk in 1969 and 1970 and for sheep in
2 1974 and elk in 1975.
3 Q During those seasons, I assume you bought a license to
4 hunt in the State of Montana?
5 A Yes, I did.
6 Q And that was some kind of non-resident license, is that
7 true?
8 A Yes, it was.
9 Q And that license, it is your understanding, enabled you
10 to hunt for big game in the State of Montana?
11 A Yes, more than just elk, yes.
12 Q Now, are you familiar with what is called a non-resident
13 combination license for big game in Montana?
14 A Yes, I am.
15 Q What is your understanding of that license?
16 A It entitles a non-resident to hunt for deer, elk and fish
17 and also hunt birds.
18 Q O.K., now that was for the 1974 season, for instance,
19 1975 season?
20 A Right.
21 Q And it is changed now to include a bear, is that your
22 understanding?
23 A Yes..
24 Q Instead of having two deer on the combination license,
25 you now have only one?
26 A That is right.
27 Q Effective 1976 season, is that your understanding?
28 A Yes.
29 Q Now, are you a property owner in the State of Montana?
30 A Yes, I am.
31 Q What kind of property and where do you have property in
32 Montana?

1 A I own a ranch west of Melrose, Montana.
2 Q What is the approximate size of that?
3 A 540 acres.
4 Q Are you buying that on a contract?
5 A Yes, I am.
6 Q Have you in the past paid any taxes to any agencies of
7 the State of Montana or counties in Montana?
8 A Yes, I have paid real estate taxes for the years 1972
9 through 1975.
10 Q And that went to Beaverhead County?
11 A Beaverhead County, yes.
12 Q Now, I believe you have alleged in your complaint in
13 this action that you as an individual are adversely
14 affected by the level of the fees for non-resident big
15 game licenses in Montana?
16 A That is right.
17 Q And a combination license also, is that true.
18 A That is so.
19 Q Would you explain how you feel you are adversely affected?
20 A In the years that I have hunted, in '59 which was prin-
21 cipally elk, I hunted only elk and I was required to
22 purchase the deer, bird and fish licenses along with
23 the elk license; that was also the case in 1970. In
24 1974 when I hunted sheep, I was required to purchase
25 the big game license even though I didn't hunt for
26 again those species plus the sheep license and in 1975
27 when I hunted for elk, I was also required to purchase
28 the deer, fish and -- what's the other one?
29 Q Bird or -- ?
30 A Bird license.
31 Q Now, is it your statement then that you are primarily
32 interested in hunting for one species of animal in most

1 seasons?

2 A That is right.

3 Q And that would be what?

4 A That would be elk.

5 Q And in order to do that, you feel you have to buy the

6 licenses -- the big game combination license?

7 A It is required.

8 Q What about the level of the license fees; does that in

9 your mind adversely affect you?

10 A Yes, the increase as I understand it, going from 151 to

11 225 along with the other increased cost would eliminate

12 my coming to Montana at least for the next couple of years,

13 and I don't know what my position would be from a financial

14 standpoint after that time, but for the next few years

15 it would stop me from coming out here.

16 Q Is it fair to say that if the fee for hunting elk were

17 lower or you could separate this out from other game,

18 you might well come out these next seasons?

19 A Yes, that is possible.

20 Q It would be your intent to come out and hunt if you

21 could economically afford it, is that true?

22 A Yes, it would.

23 Q Are you familiar with other hunters who are non-residents

24 of Montana who like to hunt in Montana?

25 A Yes, I am.

26 Q These would be primarily from the State of Minnesota?

27 A Yes, they are. In fact, they are three of the individuals

28 who hunted with me the past year.

29 Q Have you discussed this increased license fee and com-

30 bination license of the State of Montana with them?

31 A Yes, I have.

32 Q Are they going to be in the same position; are they not

1 going to come out this next year?

2 MR. HERRON: I want to make an objection clear

3 in the record. I object to this

4 line of seeking hearsay testimony.

5 MR. GOETZ: Just for the record, I will respond

6 that the door was opened by the

7 Defendants' counsel at the trial

8 for this kind of testimony, and

9 will have this in the record along

10 with your statement.

11 A Yes, there were three individuals. Their names were

12 Reginald Zettell, Robert ^Jiercks and Gregory Benesch;

13 all stating that if the fees went to 225 next year that

14 they would not be hunting in the State of Montana.

15 MR. HERRON: I am going to enter another objection

16 for the record and move that the

17 testimony be stricken and considered

18 stricken on the grounds that the

19 parties named are not parties to this

20 action and that the testimony is

21 irrelevant, immaterial and incompetent.

22 Q O.K., Mr. Moris, have you engaged services of outfitters

23 when you have hunted in the State of Montana?

24 A Yes, I have.

25 Q Have you done so every year that you have hunted for

26 big game in Montana?

27 A Yes, I have.

28 Q Is there any possibility that you will have to -- even

29 if you did hunt in Montana -- have to eliminate the

30 services of outfitters?

31 A Yes, I have thought very seriously about that.

32 Q And what is the reason for that?

1 A With the increased license fee, I would not be able
2 to afford both the increased license fee and the fee
3 of the outfitter.
4 Q With respect to these hunters that you have talked to
5 from Minnesota, do you think it would be their intention
6 from what you have learned from them to hunt if the
7 license fees weren't so high?

8 MR. HERRON: I continue to object to the form
9 for calling for a conclusion of
10 the witness as to the state of
11 mind of other people and calling
12 for hearsay evidence and being
13 irrelevant, incompetent and
14 immaterial.

15 Q Based on what they said to you -- ?
16 A Their conversations were that if the license fee went
17 up that they would not be hunting in Montana.
18 Q And was that, did -- ?
19 A It would suggest to me that they would be hunting if
20 the license fee had not gone up. In fact, one of the
21 individuals has hunted in Montana for three --

22 MR. HERRON: I object and move it be stricken;
23 it is not responsive to the question.

24 Q Go ahead.
25 A Gregory Benesch had hunted in Montana to my recollection
26 three or four years prior to 1975 and has hunted in
27 Montana, and his reply was also that he would not be
28 coming back due to the increase in license fees.
29 Q Now, you did hunt in the 1975 hunting season in Montana?
30 A Yes, I did.
31 Q And you did purchase a combination license -- a big game
32 combination license?

1 A Yes, I did.
2 Q Now, in the 1975 hunting season, you got a big game
3 hunting license that included the right to hunt elk
4 and two deer, is that true?
5 A My recollection is that it was two deer.
6 Q That generally is called for the deer, an "A" deer tag
7 and a "B" deer tag, is that right?
8 A Right.
9 Q What areas of the state did you hunt in?
10 A Well, it would be along Cherry Creek, which would be
11 in the Gallatin valley, I guess.
12 Q And that generally is in the west or southwestern part
13 of Montana?
14 A Yes.
15 Q And you were hunting primarily or solely for elk, is
16 that true?
17 A Only for elk, yes.
18 Q Do you know whether that deer "B" tag that you purchased
19 would be good for that area of hunting?
20 A To my knowledge, it would not be good for that area.
21 Q Did you get a chance to hunt in any other area to use
22 your deer "B" tag?
23 A No, we did not even hunt for the "A" tag here.
24 Q Now, in 1976, the non-resident combination license includes
25 a bear, is that your understanding?
26 A Yes.
27 Q Have you ever hunted for bear in Montana?
28 A No.
29 Q Is it your desire to hunt for bear in Montana?
30 A No.
31 MR. GOETZ: I have no further questions of this
32 witness.

CROSS-EXAMINATION BY MR. HERRON

1 Q Mr. Moris, you say you are an Accountant from Saint
2 Elmo, Minnesota, is that correct?
3 A Lake Elmo.
4 Q Are you in private practice as an Accountant or are
5 you employed by someone?
6 A I am employed by someone.
7 Q Who is that?
8 A Zayre Shopps' City.
9 Q What kind of an organization is that?
10 A It is a retail discount department store chain.
11 Q How long have you been employed by them?
12 A 8½ years.
13 Q And you have hunted in Montana, you say in 1969, 1970,
14 1974 and 1975, is that correct?
15 A Right.
16 Q Was there any special reason why you didn't hunt in
17 1971, 1972 and 1973?
18 A I was taking family vacations those years, I guess.
19 Q So I take it you are married and have a family?
20 A Yes.
21 Q And how many children do you have?
22 A Four.
23 Q What has been your salary or your income since 1969,
24 generally speaking, up to the present time?
25 A I would be guessing, but my Federal taxable income last
26 year was \$4700; that is 1974; I haven't figured out
27 my income tax yet this year.
28 Q That is your taxable income?
29 A Right.
30 Q And that is after taking deductions, etc. allowed by
31 law?
32

1 A Right.
2 Q What was your gross income before those deductions were
3 taken?
4 A Going back to 1969?
5 Q Yes, generally speaking.
6 A I would be guessing back in 1969. I would say my adjusted
7 gross income in 1974 was approximately \$14,000.
8 Q And that is what became the taxable income of \$4700?
9 A Right.
10 Q And is that your highest adjusted gross income since 1969,
11 \$14,000?
12 A Yes. It was substantially lower in prior years.
13 Q On each of these hunting trips to Montana, you did employ
14 services of an outfitter, did you say?
15 A Yes.
16 Q And who did you employ?
17 A Lester Baldwin.
18 Q Every time?
19 A Yes.
20 Q Did he charge you a fee or a price for that?
21 A Yes, he did.
22 Q In 1974, how much did you pay your outfitter?
23 A Approximately -- well, 1974, I hunted for sheep. That
24 year, Lester and I went on a hunt and that particular
25 year there was no fee.
26 Q How about 1969, 1970; what was the fees you paid?
27 A To my best recollection, \$225 a year.
28 Q How about in 1975?
29 A \$300.
30 Q And you paid that, is that correct?
31 A Yes.
32 Q How do you travel when you come out here to Montana?

1 A Usually, I travel with one of the party's automobiles.
2 Q You say usually; have you ever travelled in any other
3 manner out here?
4 A In 1974, when I hunted alone, I flew out.
5 Q Do you remember what the plane fare was about to come
6 and go?
7 A No, I don't.
8 Q And you say that -- how many days do you usually hunt
9 with Mr. Baldwin on one of these trips?
10 A Seven days plus one day going in, which would be a seven
11 day hunt.
12 Q Now, you say you are buying some real property in the
13 State of Montana, is that correct?
14 A Yes.
15 Q And you have some sort of contract or agreement to
16 purchase the property, is that correct?
17 A That is right.
18 Q And who is the seller?
19 A The seller?
20 Q Yes, who are you buying it from, in other words?
21 A Wesley Skeeters.
22 Q Is he from the Dillon area?
23 A He is from the Melrose area.
24 Q How much are you contracting to pay for that property?
25 A Approximately \$96,000.
26 Q Is there any improvements on the property?
27 A Yes, there are.
28 Q What are they?
29 A You mean such as buildings?
30 Q Yes.
31 A It has a house, the barn, machine shed and a garage.
32 Q Who resides in the house?

1 A Lester Baldwin.
2 Q Do you stay there when you come out on these hunting
3 trips at all?
4 A No, we don't hunt in that area.
5 Q And I suppose you have some sort of a leasing arrange-
6 ment with Mr. Baldwin, is that true?
7 A Yes, I do.
8 Q When did you begin this sale -- what year?
9 A When did I purchase it?
10 Q Yes.
11 A 1972.
12 Q And you have been making payments ever since, is that
13 correct?
14 A Yes, I have.
15 Q I take it you visit the property on these occasions you
16 come to Montana or do you?
17 A For hunting?
18 Q Yes.
19 A No.
20 Q Do you come otherwise than hunting to the State of Montana?
21 A Yes, I have come on other occasions.
22 Q And how often do you come, would you say?
23 A Well, in 1972, the year that I purchased the property,
24 in looking at the property and closing it, I believe
25 it was two times.
26 Q And how many times since?
27 A I did not come last year because I couldn't afford a
28 vacation and also coming out and going hunting, so in
29 1973, I believe I also came out once.
30 Q So you and your family have never really resided on the
31 property?
32 A That is right.

1 Q And you have hardly ever seen it, just on a very few
2 occasions, since you bought it, is that right?
3 A That is right.
4 Q Now, this combination license you talked about, the
5 price is purported to go from, prospectively from \$151
6 to \$225, I believe, which is about \$74. Is it your
7 testimony that \$74 difference is going to prohibit you
8 from coming out here hunting?
9 A I am saying that next year I would not be coming out
10 because of that increased fee, yes, that is right.
11 Q That \$74?
12 A Yes.
13 Q Is it your feeling that the non-resident fee should be
14 lowered or the resident fee should be raised?
15 A My feeling, I guess, as a non-resident is that the non-
16 resident fee should be lowered.
17 Q Are you sharing in the expenses of this lawsuit that
18 is being brought by the Plaintiffs?
19 MR. GOETZ: Objection, and I will instruct
20 the witness not to answer that
21 question. It is improper and
22 irrelevant; don't answer that
23 question.
24 Q Did you seek to start this lawsuit yourself or participate
25 in it?
26 MR. GOETZ: Objection again, and don't answer.
27 MR. HERRON: For the record, I think I am entitled
28 to ask these questions on the grounds
29 to see if he really is a real party
30 to the interest or if his appearance
31 here is just sham and pretense.
32 Q Do you have any idea how much it costs on these trips to

1 come out here by automobile?
2 A For vacation?
3 Q No, for the hunting trips that you have mentioned.
4 A Yes, it cost me last year approximately -- you are
5 saying just for the automobile -- \$30 for gas.
6 Q And did you stay the entire time in whatever accommo-
7 dations were provided by Mr. Baldwin, the outfitter?
8 A No, I stayed at a motel that cost \$4 an evening for a
9 few evenings before we went in. Other than that, I was
10 with Mr. Baldwin for the rest of the time.
11 Q You got a motel room for \$4 a night?
12 A Yes, it is in Ennis -- Saunders Motel.
13 Q Now, at the time you -- in 1969, 1970, 1974, 1975, I
14 take it that you applied for and received a hunting
15 license in the State of Montana in each of those years,
16 is that correct?
17 A Yes.
18 Q What was the fee in 1969 license year?
19 A In 1969 I had to pay \$154 because I was bow and arrow
20 hunting, and that is higher than the license hunting
21 with a rifle. In 1970 it went to \$154. In 1974 to my
22 best recollection, it was \$151 for the combination li-
23 cense and \$50 to my best recollection for the sheep
24 license, and in 1975, it was \$151 for the combination
25 license.
26 Q And how were your successes in each of those years?
27 A I have not had any success in killing or bagging anything
28 in the State of Montana in either of those years.
29 Q In other words, in '69, '70, '74, '75, you had no
30 success at all?
31 A That is right.
32 Q While you were hunting for elk in those years '69, '70 and

1 '75, did you see any elk?

2 A I saw elk in 1969 and 1970; I did not see any elk in

3 1974 or 1975.

4 Q And how about the sheep; did you see any sheep?

5 A I did not see any sheep.

6 Q What area were you sheep hunting in?

7 A Papoose Creek.

8 Q Could you locate that?

9 A It is in the Hillgart Range.

10 Q Is that generally the Melrose area?

11 A I believe it is south of Melrose -- well, it is south

12 and east of Ennis..

13 Q Have you ever hunted in any other states, other than

14 Montana?

15 A Wisconsin.

16 Q Any others?

17 A No.

18 Q What did you hunt for in Wisconsin?

19 A Deer.

20 Q Do you ever hunt in Minnesota?

21 A Yes.

22 Q Do you recall what you paid for a hunting license in

23 Minnesota?

24 MR. GOETZ: I will object to that as irrelevant; go

25 ahead and answer.

26 A I believe it was \$7.50.

27 Q In Wisconsin?

28 A For Minnesota.

29 Q What was it in Wisconsin?

30 A \$25.

31 Q And these were for deer hunting licenses, is that correct?

32 A Yes, Wisconsin was a non-resident license.

1 Q As far as these times you elk hunted in Montana, have

2 you ever seen any deer?

3 A Yes, I have.

4 Q Have you hunted all these years with a bow?

5 A In 1969 and 1970, I hunted with a bow. In 1974, I hunted

6 with a rifle, and in 1975, I hunted with a rifle.

7 Q And when you hunted with a bow, that is all you hunted

8 with, is that correct?

9 A Yes.

10 Q And when you hunted with a rifle, that is all you hunted

11 with, correct?

12 A Yes.

13 Q In these years, how did you go about getting your license --

14 did you write for it or how did you go about the pro-

15 cedure of getting it?

16 A I mailed an application to the Game and Fish Department

17 in Helena, Montana.

18 Q And that was for each of these four years, is that correct?

19 A To the best of my recollection, that is how they were --

20 in '69 and '70, I frankly can't recall, but I think

21 that is how I would have applied.

22 Q Prior to the time of filing this lawsuit, did you ever

23 make any protest of any kind as to the amount of the

24 fees that you were paying?

25 MR. GOETZ: Objection; irrelevant and immaterial.

26 Go ahead and answer.

27 A I have complained to Les seeing as how he was a resident

28 that I felt the fee was high, and I also felt it unfair

29 that the bow and arrow license should be more than the

30 rifle license but to register a complaint with the State,

31 I did not.

32 Q And these licenses you applied for -- you did pay the

1 fee in each case, is that right?
2 A Yes, I did.
3 Q Along with the payment of the fee, did you file any
4 protest of any kind?
5 MR. GOETZ: Objection as irrelevant and immaterial.
6 Go ahead and answer.
7 A I did not.
8 Q So the only states you have hunted in are Minnesota,
9 Wisconsin and Montana, is that correct?
10 A Yes.
11 Q In any of these years -- in 1969 and 1970 and 1975 when
12 you hunted for elk, did you ever exercise any of the
13 other privileges granted by that license other than
14 hunting for elk?
15 A No, I did not.
16 Q You didn't fish or hunt for birds or deer or anything
17 like that?
18 A No.
19 Q Can you tell us why you didn't show up at the hearing
20 that was held at the end of December on this matter in
21 Missoula, Montana?
22 A Why I didn't show up for the hearing?
23 Q Yes.
24 MR. GOETZ: Objection. That has been covered,
25 and I will instruct the witness not
26 to answer it.
27 MR. HERRON: It hasn't been covered by the witness.
28 MR. GOETZ: It is irrelevant; you know good and well.
29 MR. HERRON: I have no more questions of this wit-
30 ness except a note for the record
31 that I do reserve the right to present
32 the question to the court as to whether

1 answers shouldn't be compelled to
2 the questions that have been in-
3 structed to the witness.
4 MR. GOETZ: Let's hold this open a second. We
5 will take a short recess.
6 MR. HERRON: O.K.
7 (BRIEF RECESS)
8 MR. GOETZ: Let me say for the record that we have
9 recessed and during Mr. Herron's
10 cross-examination of Mr. Moris, a num-
11 ber of questions came up to which I
12 entered objections and instructed the
13 witness not to answer and because both
14 witness, Mr. Moris, and the next witness
15 scheduled, Mr. Lee, have come a long
16 way at personal expense to testify, that
17 is from Minneapolis, and in order to
18 preclude the possibility of having them
19 having to come out again to answer
20 questions to which we have entered ob-
21 jections, I am prepared to say that I
22 will let Mr. Moris testify as to these
23 questions for the record, and I will
24 maintain my objection. Now the questions --
25 it is my understanding of the questions
26 were essentially whether Mr. Moris is
27 sharing the costs of the lawsuit, and
28 I am willing to let Mr. Moris answer
29 that by a "yes" or "no" answer. I
30 don't think it is proper for the defense
31 counsel to go into his share of the costs
32 or how much he has paid, but I will let

1 him enter an answer "yes" or "no" to
2 the question. The next question that
3 I think that I objected to was whether
4 Mr. Moris brought this lawsuit him-
5 self or whether he was part of the
6 instigation of this lawsuit -- something
7 of that nature, and the rationale of
8 Mr. Herron is that he has a right to
9 know whether this is a sham lawsuit
10 vis-a-vis Mr. Moris or not. My feeling
11 on both of these questions is that
12 they are highly objectionable; the defense
13 counsel does not have the right to
14 inquire, discover into the motivation
15 or instigation of the lawsuit but as I
16 say, because of the expense involved,
17 I have instructed my witness to go
18 ahead and answer that question or those
19 questions. However, if the questions
20 go further than that, I will object and
21 instruct the witness not to answer.
22 The other question was related to why
23 Mr. Moris didn't show up at the trial
24 on the 29th, 30th and 31st; I simply
25 think that is an irrelevant and immaterial
26 question. I have decided on that one
27 also to allow Mr. Herron to inquire into
28 that question just to avoid problems
29 later on. I still think it is an ob-
30 jectionable question. With that state-
31 ment, I will allow you to proceed on
32 those bases, Mr. Herron.

1 Q Well, Mr. Moris, the first of the questions that we were
2 discussing here lawyer-like was as to whether or not
3 you are sharing the costs of prosecution of this lawsuit.
4 Do you want to answer that now?
5 A The answer is yes.
6 Q Another question as to the -- I forget how the question
7 was phrased, but what I was getting at is did you seek
8 the prosecution or instigation of this lawsuit or were
9 you sought out by someone else to instigate the lawsuit?
10 A I was involved with the lawsuit from the beginning.
11 Q Yes, I understand that, but what I am getting at, did
12 somebody seek you out in order to avail themselves of
13 your status as a non-resident?
14 A My recollection was that I was notified that the non-
15 resident fee would be increased for the State of Montana.
16 While it was being heard in the Legislature, I called
17 the Governor's office and objected to the increased
18 fee and after I heard it was not voted down in the
19 Legislature, I, in a telephone conversation with Mr.
20 Baldwin, decided that we would seek legal action to see
21 if we could get it reduced.
22 Q And are you referring there to the \$225 fee?
23 A Yes, I am.
24 Q Did you ever take similar action or procedures as to the
25 \$151 fee?
26 A Other than to voice my objection to Mr. Baldwin, I did
27 not.
28 Q I take it, for the new fee -- in other words, the hunting
29 season that will come up here in 1976, you have not
30 applied for nor have you received any license, have you?
31 A I have not applied for, and if the fee goes to \$225, will
32 I apply for a license in that year.

1 Q I guess it goes without saying, you haven't paid any
2 \$225 for a fee for this year?
3 A To my knowledge, no one would have paid that fee because
4 it hasn't been established yet.
5 Q I realize that; I just want to establish for the record;
6 you have not paid it anyway?
7 A No, I have not.
8 Q The third question was as to your non-attendance on the
9 trial in December in Missoula; would you care to answer
10 that now?
11 A I thought that our testimony would be acceptable by
12 affidavit, and I think it was the middle of December
13 before I found out that it would not be, and at that
14 time, Mr. Lee and Mr. Baldwin were arranging air travel
15 arrangements; Mr. Lee can comment on the problem in
16 getting air travel.
17 Q Whatever there was involved in the trouble with the
18 travel, Mr. Lee knows about, is that correct?
19 A That is right.
20 Q At any rate, you did not attempt or seek to drive out
21 here by automobile during this time?
22 A No.
23 MR. HERRON: I guess that is all the questions I have.
24 MR. GOETZ: I have one other question.
25
26 REDIRECT EXAMINATION BY MR. GOETZ
27 Q Mr. Moris, now you testify that you hunted in Minnesota,
28 and you paid \$7 for a license. My understanding is that that
29 is for a deer license, is that true?
30 A That is for a deer license only.
31 Q Do you know what year that was?
32 A 1975.

1 MR. GOETZ: I have no further questions.
2 MR. HERRON: That is all I have.
3

4 (WITNESS EXCUSED)
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B/ Donald J. Moris
Donald J. Moris, Witness

CHANGES MADE BY THE WITNESS, DONALD J. MORIS,
IN THE FOREGOING DEPOSITION

Page No.	Line No.	Change	Reason
6	12	Seals	Seals spelled wrong
7	9	2000 Shaps City	Shaps' spelled wrong
4	20	1967	52 not correct

Donald J. Moris
Donald J. Moris, Witness

C E R T I F I C A T E

STATE OF MONTANA)
ss.
County of Lewis and Clark)

I, S. Lynn Hiatt, a Notary Public for the State of Montana, do hereby certify that heretofore, to-wit, on the 16th day of January, 1976, at 1:30 P.M., personally appeared before me, DONALD J. MORIS, 9759 45th Street North, Lake Elmo, Minnesota, a witness called by the Plaintiffs in a certain action now pending and undetermined in the United States District Court, for the District of Montana, Butte Division, entitled: Montana Outfitters Action Group, Lester Baldwin, Richard Carlson, Jerome J. Huseby, David R. Lee, and Donald J. Moris, Plaintiffs, vs. Fish and Game Commission of the State of Montana; Arthur Hagenston; Willis B. Jones; Joseph J. Klabunde; W. Leslie Pengelly; and Arnold Rieder, Commissioners of the Fish and Game Commission of the State of Montana, Defendants, bearing cause number CV 75-80-BU.

I further certify that the said witness was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in relation to the matters in controversy herein, insofar as he should be interrogated concerning the same; that the testimony then given by him was by me reduced to writing in the presence of the said witness by means of shorthand, and was also recorded upon a tape recorder, and thereafter transcribed upon a typewriter by me.

I further certify that the deposition was taken in pursuance to stipulation of counsel, made a part of this record.

I further certify that after the said testimony had been transcribed, it will be mailed to the witness for review, correction and signature before any Notary Public, and thereafter

1 returned to Mr. James H. Goetz for filing.

2 I further certify that there were present at the taking
3 of the deposition, MR. JAMES H. GOETZ, Attorney at Law, 522
4 West Main, Bozeman, Montana, representing the Plaintiffs;
5 MR. CLAYTON R. HERRON, Attorney at Law, Horsky Block Building,
6 Helena, Montana, representing the Defendants; Mr. Lester
7 Baldwin, P. O. Box 118, Melrose, Montana, and Mr. David R. Lee,
8 1721 Rosewood Avenue, Maplewood, Minnesota.

9 I further certify that I am not a relative, attorney
10 nor counsel of any of the parties, nor a relative or employee
11 of such attorney or counsel, and that I am not directly or
12 indirectly interested in the matter in controversy.

13 IN WITNESS WHEREOF, I have hereunto set my hand and
14 affixed my Notarial Seal this 2nd day of February,
15 1976.

16
17
18 151 S. Lewis North
19 NOTARY PUBLIC for the State of Montana
20 Residing at Helena, Montana
21 My Commission expires August 15, 1978.

22 (Notarial Seal)

1 STATE OF MINNESOTA)
2 County of Polk) SS.

3
4 On this 2nd day of February, 1976, before me,
5 a Notary Public for the State of Minnesota, personally appeared
6 DONALD J. MORIS, known to me to be the person whose name is
7 subscribed to the within instrument, and acknowledged to me
8 that he executed the same.

9 IN WITNESS WHEREOF, I have hereunto set my hand and
10 affixed my official seal the day and year first above written.

11
12
13 151 S. Lewis North
14 NOTARY PUBLIC for the State of Minnesota
15 Residing at Bozeman, Montana
16 My Commission expires 12-12-82

17
18 (Notarial Seal)

19
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21
22
23 United States of America)
24 District of Montana)
25 I, the undersigned, Clerk of the United States District Court
26 for the District of Montana, do hereby certify that the annexed and
27 foregoing is a true and full copy of an original document on file in
28 my office as such Clerk.

29 Witness my hand and Seal of said Court this _____
30 day of _____

31 JOHN E. PEDERSON

32 Clerk

By _____
Deputy Clerk,

33 United States of America) SS
34 District of Montana)
35 I, the undersigned, Clerk of the United States District Court
36 for the District of Montana, do hereby certify that the annexed and
37 foregoing is a true and full copy of an original document on file in
38 my office as such Clerk.

39 Witness my hand and Seal of said Court this _____
40 day of _____

41 JOHN E. PEDERSON

42 Clerk

By _____
Deputy Clerk,

I N D E X

Page

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

MONTANA OUTFITTERS ACTION GROUP,)
LESTER BALDWIN, RICHARD CARLSON,)
JEROME J. HUSEBY, DAVID R. LEE,)
and DONALD J. MORIS,)

Plaintiffs,)

-vs-)

FISH AND GAME COMMISSION OF THE)
STATE OF MONTANA; WESLEY WOODGERD,)
Director of the Department of Fish)
and Game of the State of Montana;)
ARTHUR HAGENSTON; WILLIS B. JONES;)
JOSEPH J. KLABUNDE; W. LESLIE)
PENGELLY; and ARNOLD RIEDER,)
Commissioners of the Fish and Game)
Commission of the State of)
Montana,)

Defendants.)

CV 75-80-BU

DEPOSITION

OF

DAVID R. LEE

BE IT REMEMBERED: That the deposition of DAVID R. LEE
was taken in shorthand and was also recorded on a tape recorder
by S. Lynn Hiatt, a Notary Public for the State of Montana,
beginning at 2:25 P.M. on the 16th day of January, 1976, at
the office of Clayton R. Herron, Attorney at Law, Horsky
Block Building, Helena, Montana.

Present were JAMES H. GOETZ, Attorney at Law, 522 West
Main, Bozeman, Montana, representing the Plaintiffs; CLAYTON R.
HERRON, Attorney at Law, Horsky Block Building, Helena, Montana,
representing the Defendants; Lester Baldwin, P. O. Box 118,
Melrose, Montana; Donald J. Moris, 9759 45th Street North,
Lake Elmo, Minnesota.

It was stipulated and agreed by and between the parties
hereto, acting through their respective counsel, that the

1 deposition of DAVID R. LEE may be taken at this time and
2 place, pursuant to agreement of counsel, by the Plaintiffs;
3 and that the deposition may be taken before S. Lynn Hiatt,
4 a Notary Public for the State of Montana, stenographically and
5 by use of a tape recorder and the deposition shall be taken
6 in accordance with the Federal Rules of Civil Procedure for
7 uses therein provided and in accordance therewith; and that
8 all objections, except as to the form of the question, are
9 reserved; and that it is taken pursuant to the Order of the
10 Court dated December 31, 1975.

11 The following proceedings were had:

12
13 DAVID R. LEE, called as a witness by the Plaintiffs, having
14 been first duly sworn upon his oath, testified as follows:

15
16 DIRECT EXAMINATION BY MR. GOETZ

17 Q Would you state your name please for the record?
18 A David R. Lee.
19 Q Where do you reside?
20 A Maplewood, Minnesota.
21 Q What is your occupation?
22 A I am an Electrician.
23 Q Have you ever engaged in big game hunting in the State
24 of Montana?
25 A Yes, I have.
26 Q What have you hunted for?
27 A Elk.
28 Q What hunting seasons have you hunted in Montana for elk?
29 A I hunted '69 and '70 with a bow and arrow for elk; '73,
30 '74 and '75 with a rifle for elk.
31 Q Now, did you during those years engage the services of
32 an outfitter?

1 A Yes, I did.
2 Q Who was the outfitter?
3 A Lester Baldwin.
4 Q During those years you hunted for elk, you had to pur-
5 chase what is known as a non-resident combination license,
6 is that true?
7 A Right.
8 Q For those seasons, do you recall what the non-resident
9 combination license included?
10 Elk and there is two deer tags; fish and birds.
11 Q What areas of the State of Montana did you primarily
12 hunt in?
13 A The southwestern part.
14 Q Were you looking for deer at all?
15 A No, I wasn't.
16 Q You are familiar with what is generally called the deer
17 "A" tag and the deer "B" tag?
18 A Yes, I am.
19 Q Are you familiar with the areas in the State of Montana
20 where the deer "B" tag is valid?
21 A No, I am not.
22 Q Did you get a chance to use that deer "B" tag at all --
23 have you ever had a chance to use it?
24 A I wouldn't have in that area that I hunted, if I was
25 hunting deer.
26 Q And you weren't hunting deer, is that your -- ?
27 A No.
28 Q You are aware, I assume, that the non-resident combination
29 license for the hunting year 1976 will include one elk,
30 one deer and one bear, among other things?
31 A Right, I heard that.
32 Q In order for you to hunt elk, you will have to buy this

1 combination license, is that your understanding?

2 A Right.

3 Q Is it your desire to hunt for bear in Montana?

4 A No, it is not.

5 Q How about -- have you ever hunted for bear in the State

6 of Montana?

7 A No, I haven't.

8 Q Is it your desire to continue hunting in the State of

9 Montana?

10 A I would enjoy hunting in the State of Montana; if the

11 fees became so that I could come, I would come every

12 year. I plan on coming every year but if the license

13 does go to \$225, I will probably have to restrict my

14 hunting to, let's say, every other year or if it would

15 get higher than that, I would have to discontinue it

16 completely because it is right on the fringe of my

17 budget.

18 Q What is your income approximately during a given year?

19 A This year, my income was \$14,500.

20 Q Is that your gross income?

21 A Right.

22 Q And you work -- did you state your occupation?

23 A Electrician.

24 Q Is it your feeling that if the combination license were

25 eliminated and you could buy a license to hunt elk only,

26 that is probably what you would do?

27 A Definitely.

28 Q If that elk only license were cheaper than the present

29 combination license, it would be cheaper for you to

30 hunt, I assume, in the State of Montana, is that true?

31 A True, yes.

32 Q And that is because you hunt only for elk?

1 A Yes.

2 Q Now, how much time do you usually spend in Montana

3 when you come on a hunting expedition?

4 A Seven days of the hunt in the mountains and the day

5 before usually.

6 Q Does it, in your opinion, usually take about seven

7 days to conduct a legitimate hunt for elk?

8 A I don't think that is long enough, no, is that what

9 you mean?

10 Q Yes, what I am asking I guess is would you have time if

11 you wanted to hunt deer, would you have time to take

12 some extra time to hunt deer?

13 A No, my vacation time is such that I am limited to the

14 amount of time.

15 Q You, I assume, know other Minnesotans who engage in big

16 game hunting in the State of Montana?

17 A Yes, I know several.

18 Q Have you had a chance to discuss this non-resident com-

19 bination license and these increased fees in Montana

20 with other people?

21 A Yes, I have.

22 Q To your knowledge, are these people essentially in the

23 same position you are?

24 MR. HERRON: I will object to it as calling for

25 hearsay evidence.

26 A The other two plaintiffs.

27 Q Are you familiar with the other two plaintiffs?

28 A Yes, I talked to them just before I came out here.

29 Q What are their names?

30 A Jerome Huseby and Richard Carlson.

31 Q Are they in essentially the same position you are?

32 MR. HERRON: I object to it as calling for hearsay.

1 A They are not coming to the State of Montana again if
2 the license fees increase.
3 Q Now, if you do continue to come to Montana hunting in
4 ultimate years or whatever, is there a possibility
5 that you will have to eliminate paying for the services
6 of an outfitter in order to afford hunting?

7 MR. HERRON: I object as calling for speculation
8 of self-serving testimony and argu-
9 mentative.

10 A I have given thought to hunting every year without an
11 outfitter; I mean that would be one way of fitting it
12 into my budget if they increase the license, or I have
13 even considered going to a different state where the
14 license fees are comparable to what the license fees
15 have been in Montana.

16 Q Is it your testimony that if the \$225 non-resident com-
17 bination license becomes effective, you are going to
18 either have to eliminate your hunting or cut back on
19 it and do it in alternate years in Montana?

20 MR. HERRON: I object to that question as being
21 leading and argumentative.

22 MR. GOETZ: I will rephrase the question if there
23 is an objection.

24 Q You are a Plaintiff in this lawsuit -- an individually
25 named Plaintiff, aren't you?

26 A Yes.

27 Q You as well as the other Plaintiffs, I believe, have
28 alleged that you and the other Plaintiffs are adversely
29 affected by this combination license for non-residents
30 and also by the high non-resident big game license fee,
31 you are adversely affected by that, is that true?

32 A Yes.

1 Q Would you tell us generally how you are so adversely
2 affected and how the other Plaintiffs are to your
3 knowledge?

4 A We just couldn't afford to come every year. The other
5 two that I have hunted with in the past couldn't afford
6 to come at all, and I would have to consider coming
7 every other year or consider hunting without an out-
8 fitter in the State of Montana or not coming to Montana
9 at all; going to another state.

10 MR. GOETZ: I have no further questions of this
11 witness.

12
13 CROSS-EXAMINATION BY MR. HERRON

14 Q Mr. Lee, what other states have you hunted in, other
15 than Montana?

16 A Wisconsin and Minnesota.

17 Q Any others?

18 A No.

19 Q Have you been on the same hunting parties with the
20 last gentleman that testified, Mr. Moris?

21 A Yes.

22 Q Do you do most of your hunting together, is that correct?

23 A No, not in just the past few years, I guess, the last
24 four years, I haven't hunted with Don.

25 Q The only thing you say you have hunted for is elk in
26 Montana, is that correct?

27 A Correct.

28 Q Have you had any success?

29 A I did shoot a bull in '73; other than that, I shot nothing.

30 Q What did you do with that bull after he was shot?

31 A I split it up with the other people in our party and ate
32 it.

1 Q Where? In Montana or back in Minnesota?

2 A I took it home.

3 Q How about the head cape; what disposition was made of

4 that?

5 A I took the horns only.

6 Q What did you do with them; did they mount them at home?

7 A No, they are not. They are laying in the garage right

8 now. I intend to some day have them mounted or mount

9 them on a board or something.

10 Q How many antlers were involved; how many points --?

11 A There were five on one side and four on the other.

12 Q And that is the only success you have had hunting, is

13 that correct?

14 A Right.

15 Q And you say that you have or might have to contemplate

16 hunting in other states other than Montana, is that correct?

17 A Yes.

18 Q And what states have you considered?

19 A Idaho.

20 Q Do you know what the non-resident fee is for hunting elk

21 in Idaho?

22 A They have a prerequisite license like Montana has now;

23 birds and fish for \$50, and elk hunting license for \$100.

24 Q What have you hunted in Minnesota and Wisconsin?

25 A Deer.

26 Q Are there any elk there to be hunted as far as you know?

27 A No.

28 Q If I understand your testimony correctly, you feel that

29 you could afford the \$151 license fee, but you may not

30 be able to afford the \$225 license fee, is that correct?

31 A Yes.

32 Q Or that you could possibly afford the \$225 license fee

1 by dispensing with the services of an outfitter, is that

2 correct?

3 A Yes.

4 Q Have you used the services of an outfitter each time you

5 have hunted in Montana?

6 A Yes.

7 Q Was that Mr. Baldwin in each case?

8 A Yes.

9 Q What fees did you pay him for each of those years?

10 A In '69, I think it started at \$225, and last year it

11 was \$300.

12 Q Did that provide anything more than the guiding and the

13 transportation or did it provide food and lodging, too?

14 A Food and tent.

15 Q Did you on each of these occasions come out here by

16 automobile with Mr. Morris?

17 A In '69 and '70, yes; in '73, '74 and '75, with other people.

18 Q Did you always come by automobile?

19 A Yes.

20 Q And how did you come here for these proceedings today?

21 A By airplane.

22 Q What was the fare approximately?

23 A \$174 -- or \$176.

24 Q Is that round trip?

25 A Right.

26 Q What other expenses did you have when you came on these

27 hunting trips besides the outfitter, the transportation;

28 did you stay in motels here?

29 A I usually stay in a motel the night before we go in the

30 mountains.

31 Q Did you likewise find the rates at \$4 a night?

32 A Yes, I did.

1 Q The same questions I asked Mr. Moris; are you sharing
2 the costs of this litigation, fees, etc.?
3 MR. GOETZ: I will object to that question again
4 as being highly improper; I will instruct
5 the witness to go ahead and answer with
6 a "yes" or "no" answer, but go no fur-
7 ther.
8 A Yes.
9 Q How did you happen to be a Plaintiff in this suit? Did
10 you instigate the lawsuit or were you solicited to take
11 part in it by somebody else?
12 MR. GOETZ: I will object again to that question
13 and instruct the witness to answer, but
14 I think it is a highly improper question.
15 A The other two Plaintiffs that are here, Don and I and
16 Lester Baldwin were, I think, equal in initiating the
17 action through telephone calls, letters, etc.
18 Q By whom are you employed in the State of Minnesota?
19 A Hoffman Electric.
20 Q How long have you worked for them?
21 A Eight years.
22 Q Have you ever come to Montana other than for reasons of
23 hunting?
24 A Yes, I have; I came on vacation.
25 Q How many times?
26 A Twice.
27 Q In what area, generally, did you vacation in Montana?
28 A Yellowstone, West Yellowstone.
29 Q Are you a family man; do you have a wife and children?
30 A I have a wife and four children.
31 Q Do you own any property in the State of Montana?
32 A No, I don't.

1 Q While you were elk hunting in the State of Montana, did
2 you ever see deer?
3 A Yes, I did see deer.
4 Q Did you ever fire at the deer?
5 A No.
6 Q I take it you have never hunted for sheep?
7 A No.
8 Q So the last time you applied for a non-resident hunting
9 license in the State of Montana was for the 1975 season,
10 which is this past season, is that correct?
11 A Yes.
12 Q And you paid \$151?
13 A Yes.
14 Q Just for the record; you haven't applied for nor paid
15 for any \$225 combination license to this date?
16 A No.
17 Q I take it because you don't own any property in Montana,
18 you haven't paid any property taxes in the State of
19 Montana; have you paid any taxes at all to the State of
20 Montana?
21 A I think through license fees, it could be considered a
22 tax.
23 Q These hunting licenses?
24 A Yes.
25 Q Anything else?
26 A No. I don't know; does the State have a sales tax?
27 Q No.
28 A The answer is no.
29 Q When you have hunted in Montana, have you used horses?
30 A Yes.
31 Q Are those Mr. Baldwin's horses?
32 A Yes.

1 Q You or no member of your hunting party has ever brought
2 horses with you or anything like that?

3 A No.

4 MR. HERRON: That is all the questions I have.

5 MR. GOETZ: I have no further questions.

6
7 (WITNESS EXCUSED - 3:00 P.M.)
8

9 /s/ David R. Lee
10 DAVID R. LEE, Witness
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1 CHANGES MADE BY THE WITNESS, DAVID R. LEE
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David R. Lee, Witness

C E R T I F I C A T E

STATE OF MONTANA)
ss.
County of Lewis and Clark)

I, S. Lynn Hiatt, a Notary Public for the State of Montana, do hereby certify that heretofore, to-wit, on the 16th day of January, 1976, at 2:25 P.M., personally appeared before me, DAVID R. LEE, 1721 Rosewood Avenue, Maplewood, Minnesota, a witness called by the Plaintiffs in a certain action now pending and undetermined in the United States District Court, for the District of Montana, Butte Division, entitled: Montana Outfitters Action Group, Lester Baldwin, Richard Carlson, Jerome J. Huseby, David R. Lee, and Donald J. Moris, Plaintiffs, vs. Fish and Game Commission of the State of Montana; Arthur Hagenston; Willis B. Jones; Joseph J. Klabunde; W. Leslie Pengelly; and Arnold Rieder, Commissioners of the Fish and Game Commission of the State of Montana, Defendants, bearing cause number CV 75-80-BU.

I further certify that the said witness was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in relation to the matters in controversy herein, insofar as he should be interrogated concerning the same; that the testimony then given by him was by me reduced to writing in the presence of the said witness by means of shorthand, and was also recorded upon a tape recorder, and thereafter transcribed upon a typewriter by me.

I further certify that the deposition was taken in pursuance to stipulation of counsel, made a part of this record.

I further certify that after the said testimony had been transcribed, it will be mailed to the witness for review, correction and signature before any Notary Public, and thereafter returned to Mr. James H. Goetz for filing.

I further certify that there were present at the taking of the deposition, MR. JAMES H. GOETZ, Attorney at Law, 522 West Main, Bozeman, Montana, representing the Plaintiffs; MR. CLAYTON R. HERRON, Attorney at Law, Horsky Block Building, Helena, Montana, representing the Defendants; Mr. Lester Baldwin, P. O. Box 118, Melrose, Montana; and Mr. Donald J. Moris, 9759 45th Street North, Lake Elmo, Minnesota.

I further certify that I am not a relative, attorney nor counsel of any of the parties, nor a relative or employee of such attorney or counsel, and that I am not directly or indirectly interested in the matter in controversy.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal this 5th day of February, 1976.

S. Lynn Hiatt
NOTARY PUBLIC for the State of Montana
Residing at Helena, Montana.
My Commission expires August 15, 1978.

(Notarial Seal)

1 STATE OF MINNESOTA)
2 County of Ramsey) ss.
3

4 On this 13th day of February, 1976, before me,
5 a Notary Public for the State of Minnesota, personally appeared
6 DAVID R. LEE, known to me to be the person whose name is
7 subscribed to the within instrument, and acknowledged to me
8 that he executed the same.

9 IN WITNESS WHEREOF, I have hereunto set my hand and affixed
10 my official seal the day and year first above written.
11
12

13 15/ Evelyn C. Abigail
14 NOTARY PUBLIC for the State of Minnesota
15 Residing at St. Paul
16 My Commission expires _____
17
18

19 (Notarial Seal)
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23 United States of America }
24 District of Montana } ss

25 I, the undersigned, Clerk of the United States District Court
26 for the District of Montana, do hereby certify that the annexed and
27 foregoing is a true and full copy of an original document on file in
28 my office as such Clerk.

29 Witness my hand and Seal of said Court this 8th
day of November, 1976

JOHN E. PEDERSON

Clerk

By Evelyn C. Abigail
Deputy Clerk